Supreme Court, U.S.
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No. 08-1361

In the Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,

v.

TOM VILSACK,
Secretary of Agriculture,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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I. REVIEW IS WARRANTED TO SETTLE WIDESPREAD DISAGREEMENT REGARDING THE APPLICABILITY OF THE TAKINGS CLAUSE TO MONETARY ASSESSMENTS

Respondent begins by attempting to reframe the question as whether there is a conflict about the constitutionality *of FETRA*. Opp. 7 (the Eleventh Circuit's conclusion "that FETRA does not violate" the Constitution "does not conflict with any decision of . . . any other court of appeals"). Respondent undoubtedly appreciates, however, that the question warranting review is not whether *this particular statute* is constitutional, but whether, as the Eleventh Circuit and other courts have held, a government-imposed obligation to pay money is categorically beyond reach of the Takings Clause. There undeniably is a genuine and sharp split of authority on *that* important question. As the petition explains, the Eleventh Circuit's answer squarely conflicts with multiple decisions of this Court, of another court of appeals, and of several state courts of last resort. Moreover, there is no question that this sharp and widespread conflict has been fueled by disagreement about the precedential effect of this Court's splintered decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

Unable to deny the existence of the palpable conflict on this issue, respondent resorts to minimizing its significance, asserting that the Eleventh Circuit's holding conflicts with a "handful" of this Court's decisions. Opp. 17. It is a significant handful. *See Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (concluding that the

confiscation of escrow account interest is subject to Takings Clause review); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (applying Takings Clause analysis to AFDC eligibility requirement that included all family members' incomes); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (applying Takings Clause analysis to statute requiring that employer withdrawing from multiemployer pension plan must pay share of the plan's unfunded vested benefits); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (striking down as an unconstitutional taking the confiscation of interest on interpleader accounts); *see also Dane v. Jackson*, 256 U.S. 589, 599 (1921) (a state tax law will be held to conflict with the Fourteenth Amendment when "it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation"); *Brushaber v. Union Pacific R.R. Co.*, 240 U.S.1, 24-25 (1916) (similar); *Houck v. Little River Drainage District*, 239 U.S. 254, 275 (1915) (similar); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (applying the Takings Clause to strike down scheme imposing monetary assessments on adjacent landowners to fund the cost of building a new street). Ordinarily, the fact that a decision of a court of appeals conflicts with even one decision of this Court would be reason enough to grant review. *See* S. Ct. R. 10.

Moreover, still another "handful" of recent decisions by a sister court and several state courts of last resort conflict squarely with the Eleventh Circuit's conclusion (and those of other courts aligned with it) that monetary assessments are categorically beyond the purview of the Takings Clause. *See*

United States Fidelity & Guaranty Co. v. McKeithen, 226 F.3d 412 (5th Cir. 2000); *Smith v. Price Dev. Co.*, 125 P.3d 945 (Utah 2005); *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620 (Tex. 2004); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *Northern Illinois Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *Kirk v. Denver Publ'g Co.*, 818 P.2d 262 (Colo. 1991). *But see McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008) (taking Eleventh Circuit approach); *accord Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995).

As Respondent concedes, this conflict can be traced in part to markedly divergent readings of *Apfel*, this Court's most recent word on the subject of the Takings Clause and monetary assessments. No fewer than ten courts of appeals have wrestled with how to interpret *Apfel*. Four circuits have concluded that *Apfel* held that monetary assessment schemes do not implicate the Takings Clause, while six other circuits have held that *Apfel* does not constitute binding precedent on the issue. Pet. 11-12 (collecting cases). That the lower courts are so perplexed regarding what constraints, if any, *Apfel* imposes is no "minor" matter. Rather, it is a compelling reason for this Court to grant review. *See Nichols v. United States*, 511 U.S. 738, 745-46 (1994) (that the effect of a splintered decision "has so obviously baffled and divided the lower courts that have considered it . . . is itself a reason for reexamining that decision").

Respondent's attempts to distinguish the raft of conflicting cases fall short. Respondent's reading of this Court's decision in *Norwood* is simply disingenuous. That case did not remotely turn on "whether the village could circumvent its obligation *to pay compensation*" for the condemnation of Baker's land. Opp. 14 (emphasis in original). While recognizing that the case "ar[o]s[e] out of the condemnation" of Baker's land – for which $2,000 had been found to be just compensation and paid – the Court made clear that the "particular question presented for consideration" involved the village's separate imposition of an assessment of condemnation expenses on property owners. 172 U.S. at 270-71, 275. The "judgment" of the Court was that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation." *Id.* at 279. Justice Harlan's opinion nowhere implies, let alone states, that the Court's judgment turned on the fact that Baker was a condemnee.

Respondent's attempt to distinguish the Fifth Circuit's decision in *McKeithen* fares no better. The observation that the assessment scheme struck down in *McKeithen* was "retroactive," Opp. 19, merely ducks the point. Respondent cannot deny that *McKeithen* addressed and squarely rejected the notion that monetary assessment schemes are beyond the reach of the Takings Clause. *See* 226 F.3d at 416 (applying the three-factor *Penn Central* test and concluding that the statute at issue, which required insurance companies to contribute money to a

secondary workers' compensation fund, "unconstitutionally takes the plaintiffs' property" – *i.e.*, their money – "without just compensation"); *id.* at 420 (acknowledging but declining to adopt Justice Kennedy's view that measures imposing monetary obligations are beyond the reach of the Takings Clause).

Equally wide of the mark is Respondent's attempt to evade the significance of the decisions of several state courts of last resort holding that monetary obligations imposed to "offset" the impact of development are subject to Takings Clause scrutiny. Respondent contends that these cases are irrelevant because the exactions invalidated arose in the land-use context. Opp. 20. But Respondent does not deny that the "property" held to have been unconstitutionally taken in those cases was *money*. Nor could Respondent deny this Court's many cases establishing that real property is not the unique concern of the Takings Clause. *See, e.g., Ruckelshaus v. Monsanto,* 467 U.S. 986, 1002 (1984); *Long Island Water Supply Co. v. City of Brooklyn*, 166 U.S. 685, 690 (1897); *Cincinnati v. Louisville & Nashville R.R.*, 223 U.S. 390, 400 (1912).

II. FETRA IS EXTRAORDINARY, NOT ORDINARY, LEGISLATION

Throughout its Opposition, Respondent strains to foster the misimpression that FETRA is "ordinary" legislation. But it is something altogether different.

Respondent repeatedly suggests that FETRA is insulated from Takings Clause scrutiny because it is a "tax." Opp. 8, 11, 12. Respondent made that argument below and lost. The district court

thoroughly analyzed and expressly rejected the contention that the Takings Clause does not apply because FETRA is a "tax." App. 46a-49a. Respondent abandoned that argument in the court of appeals, and with good reason: a law that transfers A's assets directly to B is not "'a pecuniary burden laid upon individuals or property for the purpose of supporting the Government.'" *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213, 224 (1996).

Once it is revealed that FETRA is not a "tax," Respondent's argument that Swisher's Takings Clause claim "proves too much" because it would call into question "a broad variety of everyday economic legislation" including "taxes," Opp. 11, falls of its own weight. Indeed, the *reasons* why most taxes are not takings have no application to narrow *assessment* schemes like this one: tax measures "usually have the kind of general applicability that mutes the concerns behind takings jurisprudence. The broader the reach of a law, the less likely it is that a powerless segment of society is being unfairly singled out to bear a burden that society as a whole should bear." *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 676 (3d Cir. 1999).

Rather than defend the constitutionality of the statute Congress enacted, Respondent focuses on what Congress "*could have*" done: "funded [payments to producers and quota holders] through an increase in the federal excise tax for tobacco products." Opp. 12 (emphasis added). But because Congress did *not* fund FETRA by raising excise taxes, this "adds up to little more than saying that, if my aunt were a man, she would be my uncle." *Florida v. Royer*, 460 U.S. 491, 528 (1983) (Rehnquist, J., dissenting).

Moreover, whether or not the hypothetical excise tax measure "could have" been enacted constitutionally, it is doubtful that such legislation ever would have passed. Legislation increasing excise taxes would not have triggered the $5.1 billion offset called for in the cigarette companies' global settlement agreement with the States. *See North Carolina v. Philip Morris USA Inc.*, 618 S.E.2d 219, 221-24 (N.C. 2005). Without the benefit of the offset, the cigarette lobby would not have supported federal "buyout" legislation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) ("[W]hen a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, [the] political processes can no longer be relied upon to prevent legislative abuse.").

And a hypothetical measure increasing excise taxes paid into the general Treasury would have required FETRA to compete head to head for those funds with other needed public projects. It is at best questionable that those who championed a tobacco buyout would have been equally satisfied by (or even supported) a measure that promised no more than a chance to "pull" and "haul," *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), in the appropriations process for a share of the newly-raised funds.

Respondent asserts without analysis that Congress's decision to fund FETRA "through monetary assessments . . . rather than a tax paid into the general Treasury . . . does not transform an otherwise permissible revenue legislation into an unconstitutional taking." Opp. 13. Notably, the only case Respondent cites for this pivotal proposition, *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 50

(2005), is a First Amendment case that has nothing whatsoever to do with the issues presented here.

As Justice Scalia explained, there are fundamental differences between "off budget" approaches like FETRA and familiar taxing and spending legislation: "our government system has required [subsidies bestowed on a narrow group] to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident." *Pennell v. City of San Jose*, 485 U.S. 1, 22, 23 (1988) (Scalia, J., dissenting). Justice Scalia's opinion in *Pennell* is consistent with this Court's opinion last Term in *Polar Tankers, Inc. v. City of Valdez*, __ U.S. __, 129 S. Ct. 2277 (2009), in which the Court struck down a property tax that would have been permissible if assessed generally, rejecting claims that the government's failure to tax others was irrelevant. *See also, e.g., Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) (striking down measure designed to eliminate the ordinary political safeguards built into the legislative process.[1]

Respondent does not deny that FETRA imposes grossly disproportionate burdens on Swisher to benefit a small class of specifically identified

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[1] Respondent's only answer to this critical political process issue is to observe that FETRA was enacted in accord with prescribed lawmaking procedures – *i.e.*, that it was "passed by both Houses of Congress" and "signed by the President." Opp. 12-13 n.3. The point, however, is that the legislation was enacted through a process that carefully avoided the democratic safeguards that operate to constrain abuses in ordinary lawmaking.

private parties with whom Swisher has no meaningful nexus. Congress singled out cigar companies like Swisher to shoulder the cost of the buyout even though Swisher had only glancing involvement in the price support program, requiring Swisher to pay a sum that is some 30 times larger than could be justified based on past program participation. App. 96a-97a. Moreover, Swisher had no basis to anticipate the imposition of this staggering liability because it never had any employment relationship or other significant privity with any program beneficiaries, and because there was never any understanding, express or implied, that manufacturers would fund a "soft landing" for quota holders and producers if the program were ever repealed.

Respondent's only answer is to suggest that Swisher could remedy these inequities by exiting the cigar business altogether. Opp. 10, 17. Not surprisingly, Respondent cites no authority for the proposition that a privately held company that has been in business for over a century has no constitutionally recognized property interest in remaining in business. As Respondent would have it, the Government could fund the rebuilding of New Orleans after Hurricane Katrina by imposing prospective monetary assessments on businesses in Grand Rapids, Michigan, and the fact that the burdened businesses could shut down would be the beginning and end of the constitutional analysis. That obviously is not the law.

Respondent states inaccurately that FETRA "minimize[s] disruption to the tobacco industry" by "facilitate[ing] the transition to a free-market system." Opp. 2-3. This ignores that FETRA bestows

cash benefits on tobacco producers and quota holders *regardless of whether they continue to produce tobacco in the future.* 7 U.S.C. §§ 518a(c), 518b(c). It does not "regulate" the tobacco market prospectively, but merely transfers wealth from one narrow group of private parties to another. It is a social welfare statute. Opp. 8 (FETRA is intended "to avoid needless hardship").

Indeed, despite all of its claims that FETRA is "everyday" legislation, Respondent fails to identify a single legislative precedent for a scheme like this one. Indeed, the most directly analogous statute, a "buyout" for peanut quota holders, took a notably different (and constitutionally unproblematic) approach. *See* Pub. L. No. 107-171, 116 Stat. 179 (codified at 7 U.S.C. § 7959 (2002)) (providing for buyout to be funded by the general Treasury).

Finally, there is no merit to Respondent's reliance on *Personnel Adm'r v. Feeney*, 442 U.S. 256, 72 (1979), for the proposition that the Constitution is not concerned with the "uneven effects" of rational classifications. Opp. 10. Unlike in *Feeney*, here Congress went out of its way to sweep cigar manufacturers into the assessment scheme, did so consciously, and expressly singled the cigar manufacturer class out *by name*. 7 U.S.C. § 518d(c).

FETRA cannot be squared with the central premise of the Takings Clause: that it is unconstitutional to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Congress determined that "fairness and justice" did not support saddling tobacco quota holders with the "burdens" of an abrupt end to subsidies, but, as in *Norwood v.*

Baker, it sought to shift responsibility for the buyout to a narrow group of private parties. And, as in *West Lynn Creamery*, Congress insulated the private interests that ordinarily would have organized to oppose the measure from the impact of the scheme.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

Respondent does not deny that the Eleventh Circuit's approach – refusing to apply the Takings Clause to monetary assessments under any circumstances, and refusing to apply the Due Process Clause to assessments that are not "retroactive" – leaves a troubling gap in the protections afforded by the Fifth Amendment.

The prototypical unconstitutional taking is confiscating property from A for the purpose of giving it to B. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 79-80 (1937); *Calder v. Bull*, 3 U.S (3 Dall.) 386, 388 (1798). But the Eleventh Circuit's approach allows just that – so long as the property is money and the confiscation is prospective. A statute providing that "all lemonade stands must pay ten percent of their gross revenues to John Smith" is perfectly constitutional. The Takings Clause does not apply to the confiscation of money at all, and the Due Process Clause is not offended because the taking is prospective, and a lemonade stand wishing to avoid the seizure could simply cease its operations. That simply cannot be the law.

Instead, at least one of two things must be true. Either (1) monetary assessment schemes implicate the Takings Clause, in which case courts

may use the tools that have been developed in Takings Clause jurisprudence to weed out those exactions that go too far from those that do not; or (2) the Due Process Clause requires meaningful scrutiny of monetary assessment scheme to ensure that the requisite nexus and proportionality elements are present, even where the scheme is not "retroactive."

This case, which arises from a narrow set of stipulated facts and presents both the Takings and Due Process questions, is an excellent vehicle for making sense of how to bridge the gap left by the Eleventh Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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